BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SAMIR GADELKARIM	)	
Claimant	)	
VS.	)	
	)	Docket No. 199,449
ATLAS VAN LINES	)	
Respondent	)	
AND	)	
	)	
LEGION INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant appeals from an Award entered by Administrative Law Judge John D. Clark, dated August 26, 1997. The Appeals Board heard oral argument on February 13, 1998, in Wichita, Kansas.

APPEARANCES

Claimant appeared by his attorney, Dale V. Slape, of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Terry J. Torline, of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant appeals from the denial of permanent partial disability compensation. The Administrative Law Judge found the employer was liable only for the medical expenses incurred by claimant. The issue for Appeals Board review is whether under K.S.A. 44-501(c) claimant's injury disabled him for a period of at least one week from earning full wages at the work at which the claimant was employed by respondent. Both parties requested that if the Appeals Board determined respondent could be liable for workers compensation benefits in addition to medical compensation, this matter should be remanded to the Administrative Law Judge for a determination of the remaining issues. Neither party was willing to stipulate to the Board's deciding the remaining issues in the first instance without the Administrative Law Judge having first decided those issues that were not reached by the Administrative Law Judge in the original Award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that the decision to deny disability benefits should be reversed.

The Appeals Board agrees with the findings of fact and conclusions of law by the Administrative Law Judge enumerated in paragraphs one and three of the Award. The Appeals Board agrees with the findings of fact in paragraph two of the Award except where the Administrative Law Judge held "The record does not contain any evidence that the Claimant was taken off work for more than one week by any medical personnel and the only evidence is that the Claimant limited himself from working for approximately one month when he then returned to work for another trucking company." The Administrative Law Judge then ruled "that the Claimant was not taken off work by any physician and is entitled only to his outstanding medical expense," citing Boucher v. Peerless Products, Inc., 21 Kan. App. 2d 977, 911 P.2d 198 (1996). *See also* Osborn v. Electric Corp. Of Kansas City, 23 Kan. App. 2d 868, 936 P.2d 297, *rev. denied* 262 Kan. __ (1997). The Appeals Board disagrees with this conclusion.

Claimant has a history of bilateral hand pain dating back to 1987 when he worked for Excel. While performing his regular job duties for respondent, claimant suffered an aggravation of his preexisting bilateral hand condition. Respondent authorized claimant to receive treatment from Dr. Bernard F. Hearon on January 11, 1995. Dr. Hearon determined that claimant's condition was work related. He gave claimant a prescription for pain medication and told claimant to return in six weeks. Following this first visit, claimant was released to return to work with no restrictions. Claimant continued to work and his condition in both hands became worse. Claimant returned to Dr. Hearon with additional complaints on February 20, 1995. At this next examination, claimant was advised by Dr. Hearon that if the pain medication did not relieve his symptoms there was nothing else that Dr. Hearon could do in the way of treatment and recommended claimant "decrease his work activities as the symptoms seemed to be aggravated by the heavy lifting he did at work." This conclusion was later supported by Paul D. Lesko, M.D., who performed an independent medical examination of claimant and opined that claimant should be on

permanent restrictions including limiting repetitive grabbing and grasping, and no lifting above 50 pounds. It was Dr. Lesko's further opinion that claimant was unable to perform certain of the tasks that were required of him by his job with respondent: specifically, the packing household items and loading and unloading the truck. Claimant followed the doctor's advice and terminated his employment with respondent. Thereafter, claimant obtained other employment that also involved truck driving but that did not include any lifting or carrying duties. The truck driving jobs claimant performed following his employment with respondent were all described as "no-touch freight," meaning claimant's job did not involve loading and unloading, except with mechanical assistance such as with a forklift.

The Administrative Law Judge found claimant's date of accident to be each and every working day through the last day worked. Claimant last worked for respondent on February 24, 1995. The version of K.S.A. 44-501(c) in effect on the accident date provided in pertinent part:

> "Except for liability for medical compensation, as provided for in K.S.A. 44-510 and amendments thereto, the employer shall not be liable under the workers compensation act in respect of any injury which does not disable the employee for a period of at least one week from earning full wages at the work at which the employee is employed."

Although claimant may have missed some work and lost some wages prior to terminating his employment with the respondent, the central issue in this case is whether claimant was justified in leaving that employment. Claimant testified and the medical evidence supports the conclusion that it was primarily the heavy lifting and carrying duties involved with his employment as a residential mover that aggravated the condition in his upper extremities. The authorized treating physician advised claimant that he had nothing further to offer medically and suggested that claimant decrease his work activities. This recommendation was clearly directed towards the offending activities of packing, heavy lifting, and carrying. As a residential mover, claimant was faced with the choice of either hiring help out of his own pocket to do the packing, loading and unloading portions of his job, which would cause him to lose wages, or he could find other work. Claimant chose to find other work. Either way, he was disabled for a period of at least one week from earning full wages at the work at which he was employed. Therefore, claimant is not limited by the provisions of K.S.A. 44-501(c) to only medical compensation.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark, dated August 26, 1997, should be, and is hereby, reversed and remanded to the Administrative Law Judge for a determination of the remaining issues.

IT IS SO ORDERED.

Dated this ____ day of February 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Wichita, KS
Terry J. Torline, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director